

(10)  
No. 85-1233

Supreme Court, U.S.

FILED

MAY 19 1986

JOSEPH F. SPANIOL, JR.  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1985

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INTERNATIONAL PAPER COMPANY, PETITIONER

v.

HARMEL OUELLETTE, ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

---

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE  
SUPPORTING AFFIRMANCE**

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### **QUESTION PRESENTED**

Whether federal law has preempted the availability of a nuisance action by owners or lessees of private property brought in the state in which the property is located either to abate or to recover damages caused by an out-of-state discharge into interstate waters.

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE  
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On March 24, 1986, the Court invited the Solicitor General to express the views of the United States in this case.

**STATEMENT**

1. This case is the third in a series to reach this Court concerning the adverse effects on Vermont and its citizens of effluent discharges into Lake Champlain from a paper mill owned by petitioner International Paper Company (IPC) and located in the State of New York. The controversy was first before the Court in 1970, when the State of Vermont brought an original action in this Court against the State of New York and IPC based on IPC discharges into Lake Champlain, seeking both injunctive and monetary relief. The Court granted Vermont leave to file its complaint and appointed a Special Master to hear the matter, after which the United States intervened as a party. *Vermont v. New York*, 406 U.S. 186 (1972), 408 U.S. 917 (1972), 409 U.S. 1103 (1973).

The Court rejected the Special Master's Report (417 U.S. 270 (1974)), and ultimately dismissed the complaint after the parties entered into a settlement agreement and jointly moved for dismissal (419 U.S. 955 (1974)).

Subsequent to the filing of Vermont's original action, but prior to dismissal of that complaint, the Court considered related private claims against IPC in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). In *Zahn*, the Court affirmed the lower courts' dismissal of a class action brought in federal district court (based on diversity) by Vermont landowners and lessees of Lake Champlain lakeshore property, who challenged the legality of the IPC discharges into the lake. Members of the class sought compensatory and punitive damages. Because, however, not every member of the class had suffered pollution damage in excess of \$10,000, this Court held that the jurisdictional amount requirement had not been met (*id.* at 292, 301).

The present action commenced in 1978, when respondents, landowners or lessees of Lake Champlain lakeshore property located in three towns in the State of Vermont,<sup>1</sup> brought this class action in Vermont superior court against IPC, based on its plant's discharges of effluent

<sup>1</sup> The plaintiff class in the current lawsuit differs from that defined in the prior *Zahn* litigation only with respect to the towns covered. Both actions included landowners and lessees in the Towns of Shoreham and Bridport, but the current lawsuit substitutes such persons in the Town of Addison for those in the Town of Orwell. Compare J.A. 28 with *Zahn v. International Paper Co.*, 53 F.R.D. 430, 430 (D. Vt. 1971). In addition, the IPC paper mill at issue is not the same mill that was initially the subject of Vermont's original action and the *Zahn* litigation. The original IPC plant was closed down in 1970 and replaced by a plant (the subject of this litigation) located a few miles to the north. Vermont's complaint in the original action was amended to cover the new plant and the settlement agreement applied to that plant. See Plaintiff's Mot. for Leave to Interpose Amended and Supp. Complaint, Exh. A, at 3, *Vermont v. New York*, 406 U.S. 186 (1972); Agreement of Settlement between Vermont and IPC (J.A. 113-116).

into Lake Champlain (Pet. App. A6; J.A. 27-37).<sup>2</sup> Respondents allege the IPC discharges are "foul, unhealthy, smelly, and aesthetically displeasing," "detrimental to the Lake, and its fish and plant life," and "interfere with [respondents'] use and enjoyment of their property" (J.A. 28-29). Respondents seek both injunctive relief and money damages based on five separate counts alleging that the discharges: (1) constitute "a continuing nuisance"; (2) violate IPC's federal national pollution discharge elimination system (NPDES) permit; (3) interfere with respondents' rights as riparian owners; (4) negligently violate a "duty" IPC owes respondents; and (5) "are malicious, willful, and undertaken with reckless and wanton disregard of [respondents'] rights" (J.A. 27-34). In particular, respondents request that IPC be ordered to relocate its water intake system closer to its discharge outlets and that respondents be awarded \$20,000,000 in actual damages (*id.* at 29, 30, 31, 32). In addition, respondents seek an award of \$100,000,000 in punitive damages based on their allegations that IPC has engaged in "malicious" and "willful" misconduct (*id.* at 33).

Soon after respondents filed their complaint, petitioner removed the case to federal district court in Vermont, based on diversity jurisdiction (28 U.S.C. 1332(a)). In April 1980, the district court certified respondents' plaintiff class (86 F.R.D. 476). The district court subsequently added the State of Vermont as a member of the class based on its status as a riparian landowner (see Pet. App. A18 n.5).

In June 1981, IPC moved to dismiss respondents' complaint on the ground that respondents' interstate water

<sup>2</sup> Respondents' complaint also includes a separate cause of action (on behalf of a more broadly defined class) based on petitioner's emissions of pollutants into the ambient air (J.A. 34-37). Because the petition for a writ of certiorari and the decisions below concern only the cause of action alleging interstate water pollution, we do not address the separate class action based on interstate air pollution.

pollution claims are rooted in state law, which had been preempted by federal law (Def. Memo in Support of Mot. to Dis. 12-22; Def. Supp. Memo in Support of Mot. to Dis. 6-9). Alternatively, IPC argued that even if some potentially applicable state law remained viable, the only state law surviving federal preemption would be the law of the state in which the discharger is located (New York law),<sup>3</sup> and that only courts located in New York could entertain interstate water pollution claims based on New York law (Pet. App. A7; Reply Br. 5 n. \*). Therefore, IPC contended, respondents' claim should be dismissed on the alternative ground that because their suit was brought in a court located in Vermont (including a federal district court sitting in Vermont), respondents could not rely on the only state tort law that might remain (*ibid.*).

2. In February 1985, the district court denied petitioner's motion to dismiss, ruling that federal law does not generally preclude courts located in Vermont from hearing such claims under Vermont law (Pet. App. A4-A25), and indicating that Vermont choice of law rules would determine whether the nuisance law of Vermont or New York applies in this case (*id.* at A16, A24-A25).<sup>4</sup>

3. On interlocutory appeal, the court of appeals affirmed in a per curiam opinion, adopting the district court's opinion in "all respects" relevant to the nuisance preemption claim at issue here (Pet. App. A2-A3).

<sup>3</sup> For the purposes of this submission, we will refer to the state in which the source of pollution is located as the "source state" and the state adversely affected by the interstate pollution as the "affected state."

<sup>4</sup> The district court also rejected IPC's claims that respondents' riparian rights had been resolved in prior proceedings (the agreement Vermont entered into with IPC settling Vermont's original action) and that respondents do not possess standing to maintain a cause of action for nuisance (Pet. App. A7, A21-A25). These rulings were affirmed by the court of appeals (*id.* at A2-A3). Because IPC expressly limits its petition for a writ of certiorari to the nuisance preemption claim, the validity of these other rulings is not at issue here (Pet. i, 4 n.\*).

## INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents' complaint states a claim under the common law of nuisance based on IPC's interstate discharges, but nowhere suggests that the applicable source of nuisance law must be Vermont and not New York law. To the contrary, respondents rely on whichever state's nuisance law may apply under federal preemption principles and state choice of law rules.<sup>5</sup> For this reason, IPC's motion to dismiss the nuisance cause of action requires acceptance of one of two alternative legal arguments: either (1) federal law has preempted both New York's and Vermont's nuisance laws; or (2) only New York nuisance law remains, but federal law precludes courts in Vermont (including a federal district court located in Vermont) from applying New York law. Neither of these contentions is tenable, however, because the federal Clean Water Act expressly preserves New York common law and Vermont courts, particularly a federal district court sitting in Vermont, undoubtedly retain jurisdiction to apply New York law. On this basis alone, denial of IPC's motion to dismiss was proper.

Because, however, the courts below did not so narrowly confine their rejection of IPC's motion, this case also

<sup>5</sup> See, e.g., Plaintiffs' Supp. Memo in Opp. to Def. Mot. to Dis. 4-5 ("Applying the principles of the [Seventh Circuit's 1984 decision in] *Illinois v. Milwaukee* \* \* \* to this case, it is clear that Plaintiffs can maintain the action based on New York common law. The Complaint in this matter does not specify the jurisdiction of the common law it invokes or make a choice of law. \* \* \* Therefore, there is no basis for dismissing the present suit. \* \* \* Plaintiffs maintain their right to invoke Vermont common law and do not waive any right to have it apply \* \* \*. [S]hould[, however] this Court choose to follow [the Seventh Circuit] it must allow the case to go forward based upon New York law."); Appellees Br. 37 n.9 ("While Plaintiffs maintain their right to invoke Vermont common law and do not waive any right to have it apply, should this Court choose to follow the Seventh Circuit, it must allow the case to go forward based upon New York common law, which is in all respects nearly identical to that of Vermont.").

presents the more difficult question whether federal law has preempted the availability of any portion of Vermont's nuisance law. The district court's opinion, adopted by the court of appeals, was partially rooted in its conclusion that Vermont nuisance law was available in full force. The court appeared to suggest that either New York or Vermont law could govern all aspects of this case, depending solely on Vermont choice of law principles (under *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941)). This aspect of the court's opinion, while unnecessary to the result of rejecting IPC's motion to dismiss, is, in our view, erroneous in its broad and unlimited scope. It is our submission that respondents may not rely on Vermont nuisance law to support either an abatement remedy or a punitive damages award, unless New York law would itself call for application of Vermont law. In the Clean Water Act, 33 U.S.C. (& Supp. II) 1251 *et seq.*, Congress deliberately assigned the federal government and the source state (New York) the preeminent roles in fashioning effluent limitations and standards, including those applicable to sources of interstate pollution. Allowing respondents unilaterally to invoke the law of Vermont to abate IPC's discharges either directly through the award of injunctive relief or indirectly through the award of punitive damages would conflict with the federal scheme by allowing, in effect, the law of the affected state to impose more stringent regulatory requirements on the discharger, regardless of the desires of the federal agency or source state.

A claim for compensatory relief based on Vermont nuisance law is not, however, subject to the same federal preemption limitations. Historic reasons for ousting application of state law in the interstate pollution context do not properly apply to such a private action for damages. And, specifically, the federal Clean Water Act and its legislative history explicitly preserve any otherwise applicable state common law damage remedies, even when a discharger is in compliance with federal requirements.

Those requirements are based on considerations applicable to industry and water quality on a categorical basis, and do not purport to judge the reasonableness of harms caused by a particular discharger.

We are not unaware of the problems presented to an interstate discharger located in one state facing the prospect of private damage actions for compensatory relief in additional states under varying state laws. Of course, almost any business endeavor that engages in substantial interstate commerce and is exposed to significant tort liability could express similar policy concerns. The relevant policy choices, however, are for Congress to make in the first instance and not, absent a constitutional basis (and we perceive none), for the judiciary to impose. For now, Congress has purposely left unfettered state tort law private damage remedies for compensatory relief for water pollution. Hence, applicable state choice of law principles designate the state law to govern any particular controversy involving more than one state, as they do in most areas of traditional tort law. IPC's avenue of redress must be with Congress and not this Court.

Finally, while our views rest upon our own analysis, we note that the position IPC now takes appears to depart from the position it advanced to this Court on two prior occasions in closely related litigation. First, in *Vermont v. New York*, *supra*, the original action Vermont brought in 1970, IPC resisted this Court's jurisdiction essentially on the theory that it was amenable to suit in Vermont state courts, as well as in New York state courts.<sup>6</sup> Indeed, IPC maintained that Vermont law

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<sup>6</sup> At oral argument, counsel for IPC left no doubt that the company could be sued in Vermont courts:

Q: Do you concede that International Paper is amenable to service of process in Vermont?

A: We contend \* \* \* that we are suable in Vermont, we're suable in New York, we're ready to stand suit there, there's no question about that. This is the really available alter-

would govern the dispute whether it was litigated in Vermont courts or New York courts, based on the notion that the latter courts would likely apply the law of the state in which the injury occurred.<sup>7</sup> IPC distinguished a private damage action from a sovereign abatement action and suggested that the former should be a matter of state law.<sup>8</sup>

It could be suggested that IPC's position at that time was based on its understanding of the law just prior to this Court's decision in *Illinois v. City of Milwaukee* (*Milwaukee I*), 406 U.S. 91 (1972) and congressional passage of the Clean Water Act.<sup>9</sup> However, IPC basically adhered to the same position before this Court in the *Zahn* litigation, which occurred *after* both *Milwaukee I*

native that the State of Vermont has against us insofar as remedy goes. There's no doubt about that.

\* \* \* \* \*

[W]e are subject to suits in Vermont. We never have questioned it. Also in New York.

Tr. 39-40, 41. See also IPC Br. in Opp. 23 ("International Paper Company is subject to suit in Vermont").

<sup>7</sup> Q: Let's assume you're sued in Vermont, what would be the governing law?

A: I would think the State of Vermont law. \* \* \*

Q: And the suit in New York the same?

\* \* \* \* \*

A: \* \* \* If we're sued in New York, I would think that the New York Court would look to the Vermont law, because that's the place where the injury occurred.

Tr. 41-42.

\* See IPC Br. in Opp. 23; Tr. 34.

<sup>9</sup> We do not read this Court's decision to grant Vermont leave to file its complaint in the original action as a repudiation of IPC's arguments. In light of the exclusive nature of this Court's original jurisdiction in controversies between States, the Court's action may well have reflected the possibility that New York was a necessary party to the litigation because of the location of a controversial sludge bed within New York's borders (see 417 U.S. at 270, 276-277 n.6).

and enactment of the Clean Water Act. IPC reiterated then that it was amenable to suit in Vermont courts.<sup>10</sup> IPC also maintained that state law, and not federal common law, would govern, specifically resisting the notion (it now appears to advance) that *Milwaukee I* bore on the availability of a private action for damages under state law to redress interstate water pollution.<sup>11</sup> Still,

<sup>10</sup> See Tr. 32, 33 ("My client is sueable [sic] in the state courts of Vermont. \* \* \* We can be sued there.").

<sup>11</sup> Q: Have you considered our decision in *Illinois and the City of Milwaukee*?

A: I have indeed, your Honor. I'd be glad to answer questions about it.

\* \* \* \* \*

Q: Well, I was just wondering, though, after *Illinois and Milwaukee*, we said federal law governs, federal common law. It had still to be developed. Would the district court be free to apply state law? \* \* \*

A: Your Honor, I see the difference between *Illinois against Milwaukee* on the one hand and this case on the other. *Illinois-Milwaukee* was an action to abate a public nuisance of large measure. This is an action for money damages. \* \* \* They are not trying to abate. If they wanted to abate, they have other remedies. Indeed, under the Federal Water Pollution Control Act of 1972, citizen suits of large measure—

\* \* \* \* \*

A: \* \* \* *Illinois against Milwaukee* \* \* \* says nothing about actions brought by private people, actions brought by estate [sic] to abate.

Q: Certainly if you take a case like *Georgia against Tennessee Copper*, where the Court intimated that there would be a kind of federal common law rule, there is no intimation there that the same rule would govern action between private parties, is there?

A: None, whatever, \* \* \* the Court indicates that you would be slow to apply this doctrine to private claims. *Illinois against Milwaukee* also \* \* \* spoke of the state's right, a quasi-sovereign right in ecological purity. That is not this case. This is a strict common law, border play for money damages \* \* \*.

Tr. 22-25. See also IPC Br. 20 n.7.

whatever inconsistencies may exist in IPC's positions, resolution of the preemption issue now before the Court must turn on the intent of Congress, the issue which we address below.

### ARGUMENT

#### RESIDENTS OF VERMONT MAY MAINTAIN A COMMON LAW NUISANCE ACTION AGAINST A SOURCE OF WATER POLLUTION LOCATED IN NEW YORK UNDER WHICHEVER NUISANCE LAW APPLICABLE STATE CHOICE OF LAW PRINCIPLES DESIGNATE, EXCEPT THAT FEDERAL LAW REQUIRES THAT ANY ABATEMENT REMEDY OR PUNITIVE DAMAGES BE BASED ON THE STATE LAW DESIGNATED BY NEW YORK LAW

This case raises the question left open by this Court's decision in *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 310 n.4 (1981): the extent to which a plaintiff may rely on state common law in a suit brought against an out-of-state source of water pollution.<sup>12</sup> The courts below held that a plaintiff in Vermont could rely on Vermont nuisance law (or New York law if designated by Vermont choice-of-law rules) either to abate or to seek money damages for interstate water pollution caused by a discharger located in New York. IPC asks this Court to reverse that ruling, arguing, in effect, that the special problems faced by a source of interstate water pollution—including the prospect of multiple suits in different states and under varying state laws—require a special rule of federal preemption that would either totally immunize the source from suit based on *any* state's law or, alternatively, at least remove it from the jurisdiction of any court except for those located in the same state

<sup>12</sup> *Milwaukee II* held that the federal common law remedy recognized in *Milwaukee I* had been superseded by federal statute. *Milwaukee II* did not address the possibility that Illinois could maintain an action under Illinois law for the discharges in Wisconsin; the Court denied Illinois' cross-petition on that issue. See 451 U.S. 982 (1981); see also 451 U.S. at 310 n.4.

as the source. While we agree that the courts below erred in holding that Vermont nuisance law is fully available, we also believe that IPC seeks a far too sweeping and unsupported rule of federal preemption.

The role of federal law in this controversy is neither as limited as the courts below suggest nor as broad as IPC urges. The Clean Water Act limits the availability of Vermont nuisance law because the unilateral imposition of Vermont law on a discharger located in New York is inconsistent with that federal statute when, as in this case, plaintiffs seek abatement and punitive damages. The federal statute, however, leaves undisturbed both New York nuisance law (the law of the source state) and a remedy under Vermont nuisance law for compensatory relief, leaving remaining choice of law questions to the application of traditional rules. Moreover, except for traditional due process limitations, federal law in no manner dictates the judicial forum in which the suit must be brought. Accordingly, while we do not agree with the full breadth of the decision below, we submit that IPC's motion to dismiss was properly denied.

#### A. Federal Law Expressly Preserves The Common Law Of The State In Which The Polluting Source Is Located

IPC's threshold argument below was that federal rather than state law governs interstate water pollution and, consequently, respondents may not maintain a lawsuit based on the nuisance law of either the source state (New York) or the affected state (Vermont).<sup>13</sup> This argument relies on a seemingly straightforward, yet flawed, reading of this Court's decisions in *Milwaukee I* and *Milwaukee II*, with the former standing for the proposition that federal (not state) law governs interstate water pollution disputes and the latter simply holding that federal statutory law has supplanted federal common law.

<sup>13</sup> Pet. App. A7; see Def. Memo in Support of Mot. to Dis. 13-28; Def. Reply Memo in Support of Mot. to Dis. 1-10; Def. Supp. Memo in Support of Mot. to Dis. 6-9.

First, *Milwaukee I* did not limit the normal police power of a state to impose more stringent effluent requirements or more expansive tort liability on sources of pollution within the state's borders than might be supplied by federal law, whether statutory or common law. Although isolated statements in several of this Court's opinions could be read as supporting that extreme result,<sup>14</sup> the rationale of *Milwaukee I* does not extend so far. The "controlling principle" for fashioning federal common law in *Milwaukee I* was that "the ecological rights of a State in the improper impairment of them from sources outside the State's own territory" should be a matter of federal law. 406 U.S. at 99-100 (quoting *Texas v. Pankey*, 441 F.2d 236, 240 (10th Cir. 1971)); see also *Milwaukee II*, 451 U.S. at 335 (Blackmun, J., dissenting) ("[the] laws of one State cannot impose upon the sovereign rights and interests of another"). Such concerns are totally absent when a state seeks to impose more stringent requirements on sources of pollution within its own borders. The only effect on the neighboring state is beneficial: a decrease in pollution from out-of-state sources. There is accordingly no reason to assume that *Milwaukee I* intended to immunize from state regulation pollution from in-state sources that happens to contribute to interstate pollution, particularly when, as the *Milwaukee I* Court itself recognized (406 U.S. at 104), the then applicable federal water pollution control legislation expressly preserved "[s]tate and interstate action to abate pollution of interstate or navi-

<sup>14</sup> See, e.g., *Milwaukee II*, 451 U.S. at 313 n.7 ("[i]f state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used"); *id.* at 335 (Blackmun, J., dissenting) ("the Court has fashioned federal law where the interstate nature of a controversy renders inappropriate the law of either State"); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) ("the interstate \* \* \* nature of the controversy makes it inappropriate for state law to control"); see also Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 408 n.119 (1964).

gable waters'" (*ibid.*, quoting Federal Water Pollution Control Act of 1948, § 10(b), 33 U.S.C. (1970 ed.) 1160(b)).

Moreover, the second half of IPC's argument—that *Milwaukee II* simply held that federal statutory law has since supplanted federal common law—misapprehends the full import of the congressional enactment. For, under the very terms of the comprehensive federal water regulatory program established by the Clean Water Act, it is clear that Congress did not intend to preempt, in any fashion, the authority of a state to impose more stringent regulatory requirements or more expansive tort liability on in-state sources, regardless of the ultimate location of any harm resulting from the pollution. Section 510 (33 U.S.C. 1370), in particular, provides "that States may adopt more stringent limitations through state administrative processes, or even that States may establish such limitations through state nuisance laws and apply them to *in-state dischargers*" (*Milwaukee II*, 451 U.S. at 328 (emphasis added)).<sup>15</sup> Notably, when Congress has determined that overriding federal interests require preemption of more stringent state law re-

<sup>15</sup> Section 510 provides:

[N]othing in this [Act] shall (1) preclude or deny the right of any State \* \* \* to adopt or enforce [any effluent limitation or standard] \* \* \* except that \* \* \* [a] State \* \* \* may not adopt or enforce any effluent limitation, or \* \* \* standard \* \* \* [that] is less stringent than [one adopted] \* \* \* under this [Act]; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C. 1370. See also 33 U.S.C. 1316(c) (emphasis added) ("Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources *located in such State.*"); 33 U.S.C. 1318(c) (emphasis added) ("Each State may develop and submit to the Administrator procedures under State law for inspection, monitoring, and entry with respect to point sources *located in such State.*").

quirements on a source of pollution, Congress has explicitly so provided. See, e.g., 33 U.S.C. 1322(f) (limiting more stringent state regulation of marine sanitation devices); see also 42 U.S.C. 7416, 7543, 7545(c)(4), 7573 (preempting certain state air pollution regulation of moving sources). Here, however, Congress has specifically chosen to preserve, rather than preempt, the authority of the source state to impose more stringent standards on dischargers of interstate pollution within its own borders, and the courts must defer to that legislative judgment.<sup>16</sup>

Congress did not, moreover, evince any intent to preempt the authority of the source state to impose tort liability for damages on dischargers located within its borders. Indeed, Congress deliberately eschewed any effort to touch on the issue of private damages for water pollution in the Clean Water Act. See *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 13-18 & n.27 (1981). The Act's citizen suit provision is confined to injunctive relief to enforce effluent standards or limitations established by the Act (33 U.S.C. 1365; *Sea Clammers*, 453 U.S. at 14), or the imposition of civil penalties for violation of those regulatory requirements, with any penalties recovered going to the United States Treasury.<sup>17</sup> Neither the statutory language nor the legislative history of the Clean Water Act suggests Congress intended to immunize from state common law damage remedies even those parties com-

<sup>16</sup> There is, of course, no occasion to utilize the negative implications of the dormant Commerce Clause to prohibit state action that Congress has authorized. Cf. *Northeast Bancorp, Inc. v. Board of Governors*, No. 84-363 (June 10, 1985).

<sup>17</sup> The statement in this Court's recent opinion in *County of Oneida v. Oneida Indian Nation*, No. 83-1065 (Mar. 4, 1985), slip op. 9 (as revised), that the Water Act "made available civil penalties for violations of the Act" should not be read as intending that private parties themselves retain the penalties, in light of the clear legislative history to the contrary. See H.R. Rep. 92-911, 92d Cong., 2d Sess. 133 (1972); S. Rep. 92-414, 92d Cong., 1st Sess. 79 (1971).

plying with the Clean Water Act's strict regulatory requirements. The effluent limitations and standards established by the Act are based on certain statutorily prescribed cost and technological considerations applicable to industry on a categorical basis, and not on the reasonableness of the harm caused by a particular discharger. See generally *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977); *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64 (1980); see also 40 C.F.R. 122.5(c) ("The issuance of a permit does not authorize any injury to persons or property or invasion of other private rights, or any infringement of State or local law or regulations."). The Senate report on the bill speaks directly to the issue, specifically noting that damage remedies under state law would remain available:

[I]f damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.

S. Rep. 92-414, 92d Cong., 1st Sess. 81 (1971); see *Sea Clammers*, 453 U.S. at 16 n.26; see also *New Jersey v. City of New York*, 283 U.S. 473, 482-483 (1931).<sup>18</sup>

**B. Federal Law Does Not Preclude Courts (Including A Federal District Court) Located In Vermont From Hearing A Nuisance Claim Based On Interstate Pollution Even If That Claim Must Be Based On New York Nuisance Law**

We have shown that federal law has not preempted the law of New York (the source state). It follows that IPC's motion to dismiss was properly denied unless federal law nevertheless precludes courts in Vermont from hearing a nuisance claim based on New York law.

<sup>18</sup> See *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1540 (D.C. Cir.), cert. denied, 469 U.S. 1062 (1984) ("The fact that EPA has determined that [the practice] is adequate for purposes of [the federal regulatory statute] does not compel a jury to find that the [practice] is also adequate for purposes of state tort law as well" (emphasis omitted)).

IPC argues (Pet. App. A7; Reply Br. 5 n.\*, 7) that federal law precludes courts located in Vermont (including a federal district court) from hearing a New York-based nuisance law claim on essentially the same ground that IPC argues that Vermont law has been preempted. IPC, in effect, equates legislative jurisdiction with judicial jurisdiction.<sup>19</sup> See Reply Br. 7. Notably, IPC's theory extends (*id.* at 5 n.\*), as it must in this case, to a federal district court located in Vermont sitting in diversity jurisdiction. The only legal authority IPC cites in support of its novel argument is an analogy to Section 505(c) of the Clean Water Act, which provides that citizen suits to enforce effluent limitations and standards established by the Act can be brought "only in the judicial district in which such source is located" (33 U.S.C. 1365(c)).

Whatever weight IPC's contention might have as a matter of policy, its legal argument is wholly insubstantial. It is simply too late in the day to argue that courts in one jurisdiction may not, in the absence of a specific legislative or constitutional prohibition, apply the law of another state. Section 505 of the Clean Water Act, moreover, does not aid IPC's cause. Section 505 concerns citizens suits brought under the Clean Water Act to enforce that Act's requirements. This case does not involve such a suit, but a private action brought under state nuisance law.<sup>20</sup> Manifestly, a congressional decision to

<sup>19</sup> IPC does not claim that the Vermont courts, including the Vermont federal district court, lacked personal jurisdiction over it in this case. Instead, IPC advances a general federal rule of venue or subject matter jurisdiction applicable to private nuisance suits based on interstate pollution.

<sup>20</sup> Respondents' complaint does include one count based on an alleged violation of IPC's NPDES permit. The validity of that count, however, was not addressed in the opinions below, nor is it discussed in the petition for a writ of certiorari. In all events, there is no suggestion in the complaint that respondents intend to maintain a citizen suit based on the Clean Water Act. Instead, the claim appears to assert a private right of action for damages under that

establish venue requirements for the enforcement of a particular federal statute cannot justify a judicial extension of those requirements beyond the Act's terms.<sup>21</sup>

**C. Federal Law Has Preempted The Availability Of Abatement And Punitive Damage Remedies Under Vermont Nuisance Law Against A Discharger Located In New York Unless New York Law Would Itself Call For Application Of Vermont Law, But Does Not Preempt A Claim For Compensatory Damages Under Vermont Law**

1. While not strictly necessary to the proper disposition of IPC's motion to dismiss, the courts below also addressed the more difficult question whether federal law has preempted the nuisance law of the state adversely affected by interstate pollution, here Vermont. The lower courts concluded that federal law has left Vermont law undisturbed. We disagree. In our view, federal law clearly preempts Vermont nuisance law as a legal basis for *abating* a source of pollution located in New York, unless New York law would itself call for application of Vermont law. Absent such "consent" to an interstate application of state law by New York, the imposition of Vermont law to *abate* a discharger in New York would be inconsistent with the rationale of *Milwaukee I* and would, in any event, conflict squarely with the comprehensive statutory scheme for water pollution abatement Congress established in the Clean Water Act.<sup>22</sup>

Act, an avenue subsequently foreclosed by this Court in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981).

<sup>21</sup> IPC's claim that Vermont courts may possibly be biased is, of course, equally true of New York courts (see, e.g., *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971)), which is why federal diversity jurisdiction potentially exists in a case such as this one. See 3 J. Elliot, *Debates on the Federal Constitution* 487 (1836) (remarks of James Madison).

<sup>22</sup> The Tennessee Supreme Court recently came to this conclusion, dismissing an abatement action brought by Tennessee against a

As we have discussed (pages 12-13, *supra*), *Milwaukee I* was premised on the notion that application of the law of one state to abate interstate pollution caused by a source located in another state is generally inconsistent with the sovereign rights of states to control sources of pollution within their own borders (subject, of course, to supervening exercise of congressional power). The courts below did not dispute the correctness of this basic premise (Pet. App. A10), but reasoned that subsequent developments—specifically the enactment of the Clean Water Act in 1972—had somehow “authorized” the application of previously preempted Vermont law (Pet. App. A11). We agree that the Clean Water Act is the appropriate touchstone for preemption analysis,<sup>23</sup> but submit that the Act’s terms leave no doubt that Vermont’s nuisance abatement remedy is preempted, unless New York law itself required application of Vermont law.

The linchpin of the Clean Water Act is the national pollution discharge elimination system (NPDES) permit program, which the federal government either administers itself or, if certain conditions are met, delegates to the source state for administration. 33 U.S.C. 1311, 1312, 1316, 1317, 1328, 1342 and 33 U.S.C. (& Supp. II) 1344. Without a NPDES permit, any discharge into navigable waters is unlawful (33 U.S.C. 1311(a)). Effluent limitations and standards imposed by the permits are generally derived from two primary sources: technological requirements established by the federal government (33 U.S.C. 1311(b), 1314(a) and (b), 1316, 1317) and water qual-

discharger located in North Carolina on the ground that interstate application of Tennessee law was preempted by the Clean Water Act. See *Tennessee v. Champion International Corp.*, No. 85-36-I (filed Apr. 21, 1986).

<sup>23</sup> As in any preemption case, the question here is basically one of federal statutory interpretation. See Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 38 (1985); see also Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 881, 958 (1986).

ity standards the states may develop in the first instance for waters within their respective jurisdictions. These effluent requirements may be increased, as previously noted (pages 13-14, *supra*), should the source state wish to impose more stringent abatement requirements on dischargers located within its borders. In short, the unambiguous focus of the Clean Water Act is on establishing a partnership between the federal and state governments for the abatement of discharges originating within each state’s borders, with the latter being allowed both to administer the permit program and to impose more stringent requirements.<sup>24</sup>

Congress, moreover, deliberately chose to assign a pre-eminent position to the source state in the interstate pollution context, conferring upon the affected neighboring state only an advisory role in the formulation of applicable effluent standards or limitations.<sup>25</sup> The affected state may try to persuade the federal government or the source state to increase effluent requirements, but ultimately possesses no statutory authority to compel that result, even when its waters are adversely affected by out-of-state pollution. See 33 U.S.C. 1341(a)(2), 1342(b)(3) and (5), 1344(g)(1), (h)(1)(C) and (E);

<sup>24</sup> See, e.g., 33 U.S.C. 1311(m) (providing for modification of certain effluent limitations with concurrence of state for “discharges by an industrial discharger in such State”); 33 U.S.C. 1341(a)(1) (prior to receipt of federal NPDES permit, discharger must first obtain certification “from the State in which the discharge originates”).

<sup>25</sup> To be sure, the Clean Water Act provides both citizens and the governor of an affected state with specific enforcement authority, but those suits are limited to enforcement of the effluent limitations and standards established by the Act, which, as just described, are determined by EPA and supplemented only by the source state. See 33 U.S.C. 1365(a), (b) and (h); see also S. Rep. 92-414, 92d Cong., 1st Sess. 79 (1971) (“Section 505 [does] not substitute a ‘common law’ or court-developed definition of water quality. [The applicable] effluent control limitation or standard, would \* \* \* have been settled in the administrative procedure leading to the establishment of such effluent control provision.”).

*Milwaukee II*, 451 U.S. at 325-326; see also 33 U.S.C. 1319(a), 1344(s)(2).<sup>26</sup>

Allowing respondents to invoke the law of Vermont to abate IPC's discharges would squarely conflict with the federal scheme because the law of the affected state would thereby be enabled to impose more stringent regulatory requirements on the discharger, regardless of the desires of the federal agency or source state. Such a result would both significantly "impair[] the federal superintendence of the field" Congress clearly envisioned in the Clean Water Act (see *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)) and conflict with the "full purposes and objectives of Congress" in providing the source state with sole authority to supplement federal requirements (see *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (footnote omitted)). For this reason, we disagree with the lower courts' conclusion that respondents' request for injunctive relief can necessarily be maintained under Vermont nuisance law. To the extent that respondents seek abatement of IPC's discharges through forced technological modifications of IPC's facility, they can look only to federal law or New York law, including the latter's nuisance law—unless, of course, New York law would itself require application of Vermont law, since, then, the conflict presented by unilateral imposition of Vermont law on a New York discharger would be eliminated.<sup>27</sup>

The courts below reached a contrary conclusion based, first, on an overly generous reading of the Clean Water

<sup>26</sup> Indeed, the record suggests that Vermont exercised its advisory function in this case and succeeded in convincing the permitting agency to impose more stringent abatement requirements on IPC (see J.A. 65-68).

<sup>27</sup> We note that IPC has previously suggested to this Court that New York law would call for application of Vermont law. See pages 7-8 note 7, *supra*. See also *Cousins v. Instrument Flyers, Inc.*, 44 N.Y.2d 698, 699, 376 N.E.2d 914, 915 (1978) ("lex loci delicti remains the general rule in tort cases to be displaced only in extraordinary circumstances").

Act's two non-preemption provisions (Pet. App. A11-A17) and, second, on an underestimation of the inconsistency between the statutory structure of the Act and allowing application of an abatement remedy based on Vermont law (*id.* at A17-A20). We do not question that the Clean Water Act expressly preserves state law to a specified extent, but, contrary to the rulings below, the Act does not "authorize" the availability of state law to abate a discharge in another state. As discussed above, Section 510 of the Act, 33 U.S.C. 1370, expressly permits a state to set pollution standards more restrictive than the federal standard. This Court has recognized, however, that this authority is limited to discharges occurring within the borders of that state. *Milwaukee II*, 451 U.S. at 327-328. Indeed, Section 510(2), 33 U.S.C. 1370(2), was adopted from an almost identical provision of the 1948 Act, as amended, 33 U.S.C. (1970 ed.) 1151(c), which the Court in *Milwaukee I* found insufficient to establish an intent by Congress not to preempt the law of the non-source state in this regard. See 406 U.S. at 102. Section 505(e), 33 U.S.C. 1365(e), similarly does not "authorize" a state law remedy to abate out-of-state discharges. As this Court noted in *Milwaukee II*, 451 U.S. at 328-329, Section 505(e) addresses only the preemptive scope of the citizen suit provision of Section 505 and "means only that the provision of such suit does not revoke other remedies." It does not address the broader issue of the preemptive scope of "the Act as a whole" (see 451 U.S. at 329).

In addition, the district court erroneously concluded that the application of a Vermont abatement remedy was not preempted because it would not "interfere with the objectives of the Act[.]" which the court characterized as the "elimination of the discharge of pollutants" (Pet. App. A17, A18). The preemptive scope of the Clean Water Act, however, is not limited simply to conflicts with the Act's ultimate goals (see 33 U.S.C. 1251(a)), but extends to state laws that conflict with the statutory mechanisms the Act establishes to reach those goals. See

*Michigan Cannery & Freezers Ass'n v. Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461, 477 (1984). Here, unilateral application of Vermont nuisance law to abate a source in New York would, as we have explained, conflict with the federal statutory scheme. That the intrusion is created by the application of Vermont *common law* instead of Vermont *statutory law* is of no legal consequence. The object of federal preemption is the interstate application of the abatement remedy, whatever the source of that remedy in the affected state's law.

2. Whether federal law has similarly preempted any *damage remedy* respondents might look to under Vermont nuisance law presents a closer and more difficult question. There is considerable force to the view that federal law should generally be read as preempting (or not preempting) state law "cause[s] of action" rather than only particular remedies for their violation. Cf. *Davis v. Passman*, 442 U.S. 228, 239 (1979). Hence, the conclusion that federal law preempts Vermont nuisance law in the interstate pollution abatement context strongly suggests that, so too, respondents cannot seek a damage remedy under Vermont nuisance law. As this Court has recognized, however, preemption analysis may, in some circumstances, turn on the remedy being sought, particularly on the distinction between injunctive relief (including abatement) and money damages. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). Although neither the courts below nor the parties focused directly on that possibility here, we believe such a distinction is appropriate to the extent that respondents seek compensatory damages.

Simply put, the principal factors that supported this Court's decision in *Milwaukee I* to oust the affected state's law and to fashion a federal common law of nuisance for interstate water pollution are not present in a case involving a private action for damages. *Milwaukee I* and the precedent on which it relied were all cases concerning the right of a state, as sovereign, to protect its natural environment from interstate pollution. Spe-

cifically, the cases all involved (and endorsed) the right of the affected state in its sovereign capacity to maintain an action under federal law to *abate* out-of-state pollution.<sup>28</sup> In each case, "quasi-sovereign" interests of the states in their respective natural environments were at stake, particularly the right of a state not to be forced to give up the quality of its natural environment "for pay." *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).<sup>29</sup> Such sovereign rights are not at issue in a lawsuit, such as this one, in which private citizens seek money damages for harm caused to them by pollution originating out-of-state. See *id.* at 238 (remarking on "hesitation that we might feel if the suit were between private parties, and the doubt whether for the injuries which they might be suffering to their property they should not be left to an action at law").<sup>30</sup> In sum, to

<sup>28</sup> *Milwaukee I*, 406 U.S. at 104; *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907); *New York v. New Jersey*, 256 U.S. 296 (1921); *New Jersey v. City of New York*, 283 U.S. 473, 476-477 (1931); *Missouri v. Illinois*, 200 U.S. 496 (1906); see also *Georgia v. Tennessee Copper Co.*, 237 U.S. 474 (1915); 237 U.S. 678 (1915); 240 U.S. 650 (1916).

<sup>29</sup> See, e.g., *Milwaukee I*, 406 U.S. at 99, 104-105; *Georgia v. Tennessee Copper Co.*, 206 U.S. at 237; *North Dakota v. Minnesota*, 263 U.S. 365, 373 (1923); *Oklahoma v. Cook*, 304 U.S. 387, 393 (1938); see also *Texas Industries, Inc.*, 451 U.S. at 641; *Milwaukee II*, 451 U.S. at 335 (Blackmun, J., dissenting); *Missouri v. Illinois*, 200 U.S. at 518.

<sup>30</sup> In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 11 n.17 (1981) this Court did not reach the question whether private parties could maintain an action for damages based on interstate water pollution under the federal common law of nuisance, having concluded that the federal common law of nuisance was itself preempted by the Clean Water Act. The Court did, however, note that the request went "considerably beyond" the cause of action recognized in *Milwaukee I* (453 U.S. at 10). In our view, the appropriateness of extending federal common law to a private damage action should depend on the nature of the interests providing the impetus for the applicability of federal common law in the first instance. Where those interests do not depend at all on the nature of the relief being sought (unlike here),

the extent that *Milwaukee I* may be considered to provide still-authoritative perspective for determination of the preemption question here, we do not believe the principle of that decision properly extends to preemption of a private action for compensatory damages.<sup>31</sup>

In all events, as we have explained (page 18 note 23, *supra*), the touchstone for preemption analysis here is the relevant congressional enactment, the Clean Water Act. That Act provides no sufficient basis for federal preemption of a private action for compensatory relief under the nuisance law of the affected state. Most fundamentally, the Clean Water Act provides a "comprehensive regulatory program" for the abatement of water pollution. *Milwaukee II*, 451 U.S. at 317 (emphasis added); *Train v. City of New York*, 420 U.S. 35, 37 (1975); see generally *Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.*, No. 83-1013 (Feb. 27, 1985), slip op. 2-3; *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 69-72 (1980); *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 116-121 (1977). A comprehensive regulatory presence is not enough, however, to establish congressional intent to preempt related state damage remedies. For example, in *Silkwood v.*

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there would be no basis for a distinction. See, e.g., *County of Oneida v. Oneida Indian Nation*, No. 83-1065 (Mar. 4, 1985), slip op. 7 (finding federal common law damage action where "Indian relations \* \* \* the exclusive province of federal law").

<sup>31</sup> While the Court in *Milwaukee I* tersely repudiated (406 U.S. at 102 n.3) the prior suggestion in *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 n.3 (1971), that an action for damages and injunctive relief could be brought under the affected state's common law, the only remedy at issue in *Milwaukee I* was abatement. *Wyandotte* itself was an action brought by a sovereign and not a private damage action. See also *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324 (5th Cir. 1985) ("Clearly, if federal courts are to remain courts of limited powers \* \* \* a dispute \* \* \* cannot become 'inter-state,' in the sense of requiring the application of federal common law, merely because the conflict is not confined within the boundaries of a single state.").

*Kerr-McGee Corp.*, 464 U.S. 238 (1984), the Court unanimously agreed that while the federal government had unquestionably occupied the field of nuclear power safety regulation, the states remained free to provide compensatory remedies for those suffering radiation injuries. See *id.* at 256; *id.* at 263-264 (Blackmun, J., dissenting); *id.* at 275-276 (Powell, J., dissenting); cf. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 205, 207-208, 216, 223 (1983) (state safety regulation of nuclear power preempted, but not traditional state economic regulatory authority).

Indeed, as we have explained (pages 14-15, *supra*), Congress completely refrained from addressing the issue of the availability of private damages for water pollution in the Clean Water Act. That would ordinarily indicate that Congress intended to preserve, rather than prohibit, any common law damage remedy for compensatory relief that might otherwise apply. See *Silkwood*, 464 U.S. at 263-264 n.7 (Blackmun, J., dissenting) ("The absence of federal regulation governing the compensation of victims \* \* \* is strong evidence that Congress intended the matter to be left to the States."); cf. *Pacific Gas & Electric Co.*, 461 U.S. at 207-208. And, we perceive no basis in the statutory language or legislative history of the Clean Water Act for a different preemption rule in the interstate water pollution context. Unlike the abatement remedy, the interstate application of a compensatory damage remedy does not upset the partnership the Clean Water Act establishes between the federal government and the source state to regulate pollution. The discharger remains free to continue to act within applicable effluent limitations and standards, while paying for any actual injury that unreasonably results. The principal effect of the state law compensation remedy is economic: to require a discharger to bear a social cost of the discharge. To be sure, compensatory damages potentially may have an incidental regulatory effect. See *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-247

(1959).<sup>32</sup> Preemption of state law turns, however, on irreconcilable conflicts and not on incidental possibilities. See *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 299 (1976); see also *Local 296, International Union of Operating Engineers v. Jones*, 460 U.S. 669, 676 (1983). An award of compensatory damages presents no such conflict so long as the measure of damages is confined to actual damages.

3. Respondents' claim for punitive damages (J.A. 33-34, 36), however, does not similarly survive preemption analysis. The primary purpose of punitive awards is to coerce the discharger into changing its behavior and, consequently, such awards are more akin in effect and design to an abatement remedy. See *Silkwood*, 464 U.S. at 263-265 (Blackmun, J., dissenting); see generally Prosser & Keeton, *The Law of Torts* 9 (5th ed. 1984) (footnote omitted) ("[Punitive] damages are given to the plaintiff over and above the full compensation for the injuries, for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant's example."). Although in certain contexts, the additional regulatory effect may not call for a different preemption result from that reached for compensatory relief (see *Silkwood v. Kerr-McGee Corp.*, *supra*), a distinction is warranted here. As previously discussed, the Clean Water Act assigns the task of abatement exclusively to the federal government and the source state, while providing in a specifically limited fashion for accommodation of the interests of the affected state. Punitive damage awards, at the behest of the law of the affected state, would therefore frustrate the federal statutory scheme by changing the terms of the accommodation struck by Congress. Cf. *Electrical Workers*

<sup>32</sup> Because of the extent to which *Garmon* and its progeny have interpreted the federal labor law as intended to occupy the field (see, e.g., 359 U.S. at 243), there is a more comprehensive basis for finding conflict with (and thus preemption of) state law in that field than is generally the case. The labor preemption cases, accordingly, do not provide appropriate guidance here.

*v. Foust*, 442 U.S. 42, 50-52 (1979). The power of one state unilaterally to apply its laws either itself or through lawsuits filed by its citizens to penalize discharges in another state is tantamount to the power to shut down the discharges entirely, regardless of the abatement levels established by the federal statutory scheme. See *Tennessee v. Champion International Paper Corp.*, No. 85-36-I (Tenn. Sup. Ct. filed Apr. 21, 1986) (application of civil penalties to out-of-state discharges preempted by Clean Water Act).<sup>33</sup> It follows, here, that punitive awards under Vermont nuisance law would conflict with the Clean Water Act and, like the Vermont abatement remedy previously discussed, should be preempted.<sup>34</sup>

This Court's decision in *Silkwood* does not call for a different result. There, punitive damages survived preemption because the legislative history of a relevant federal statute as well as pertinent federal agency regulations provided strong evidence that Congress intended that traditional remedies of "state tort law would apply with full force unless they were expressly supplanted" (464 U.S. at 255 (emphasis added)). The Court acknowledged that absent such evidence, preemption of punitive awards might be in order (*id.* at 250-251). There is no comparable evidence here of congressional acquiescence to the direct regulatory effect of the interstate imposition of punitive awards. To the contrary, the

<sup>33</sup> Recent experience has confirmed the unbounded reach of punitive awards. See generally Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 59 (1982). And courts have recognized the special problems posed by their imposition in cases involving multiple plaintiffs. See, e.g., *Roginsky v. Richardson-Merrill, Inc.*, 378 F.2d 832 (2d Cir. 1967) (Friendly, J.).

<sup>34</sup> The courts below virtually ignored respondents' request for punitive damages. The district court did not include a description of the claim in its summary of respondents' complaint (Pet. App. A6) and when discussing preemption twice referred to how "compensatory damage awards \* \* \* merely supplement the standards and limitations imposed by the [Clean Water] Act" (*id.* at A17, A18 (emphasis in original)).

unilateral application of punitive awards across state boundaries would effectively redesign the regulatory scheme by overriding the secondary role Congress expressly assigned the affected states in the Clean Water Act. This case therefore falls within the Court's admonition in *Silkwood* that preemption of punitive damage awards is appropriate where such awards present "an irreconcilable conflict" with the federal statutory scheme or "frustrate any purpose of the federal remedial scheme" (464 U.S. at 256-257).

Finally, in contrast to the situation in *Silkwood*, other avenues are available to private plaintiffs for imposition of monetary penalties on the discharger for flagrant violations of the law. Under the Clean Water Act, a private citizen, not just the responsible federal agency, may ask a court to impose substantial civil penalties on a discharger that violates effluent standards and limitations the Act imposes. See 33 U.S.C. 1365(a), 1319(d) (up to \$10,000 per day of violation).<sup>35</sup> In addition, because the Clean Water Act does not preempt at all the authority of the source state to impose more stringent requirements, citizens (such as respondents here) are always free to seek punitive awards under that state's law, should they be available—or even under the affected state's law, should the source state call for its application.

**D. Applicable Choice Of Law Principles Will Determine Which State Law Governs In A Private Action For Compensatory Damages Based On Interstate Water Pollution**

We are not unaware or unappreciative of the practical problems presented to an interstate discharger of water pollutants facing the prospect of private damage actions

<sup>35</sup> At the behest of a citizen suit, a court recently imposed a civil penalty of \$1,285,000 on a discharger based on violations of the Clean Water Act. See *Chesapeake Bay Foundation v. Gwaltney*, 611 F. Supp. 1542 (E.D.Va. 1985), appeal pending, No. 85-1873 (4th Cir.).

for compensatory relief in more than one state and possibly under varying state laws. There is, however, no sound legal basis for the sweeping rules of federal preemption of state legislative jurisdiction and judicial authority IPC has advanced in this litigation—and, specifically, no basis for believing that Congress intended to supersede the longstanding and familiar feature of our jurisprudence that compensatory damages for tortious conduct are recoverable in the courts of the place of injury. IPC's concerns are, at bottom, not significantly different from those faced by any business enterprise that engages in substantial interstate commerce and is exposed to significant tort liability: the potential for unfavorable state law and unfavorable judicial forums. These concerns have not, without more, historically defeated the power of the courts either to hear claims for injuries occurring in their jurisdictions or to determine, in the event more than one state law is potentially available, which state law will govern. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Young v. Masci*, 289 U.S. 253, 258-259 (1933). So long as the forum state satisfies applicable constitutional limitations (e.g., due process, equal protection, and full faith and credit) both as to the exercise of its jurisdiction and its choice of law,<sup>36</sup> and Congress has not adopted a special rule for the occasion, this Court's role is limited. Since IPC can point neither to a specific congressional enactment nor to a particular constitutional provision to support its broad preemption claim, it must look to Congress, and not to this Court, for relief—if any relief is appropriate.

<sup>36</sup> See, e.g., *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981); *Hughes v. Fetter*, 341 U.S. 609 (1951).

**CONCLUSION**

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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**MAY 1986**